In the Supreme Court of the United States

October Term, 1977

No. 77-1769

EASTERN SCIENTIFIC COMPANY
PETITIONER

v.

WILD HEERBRUGG INSTRUMENTS, INC.
RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

The Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit, entered in the above-entitled case on March 17, 1978.

Opinions Below

The opinion of the Court of Appeals, printed in Appendix A to this Petition, is officially reported at 572 F.2d 883. It is unofficially reported at 1978-2 Trade Cases, ¶61,926.

Jurisdiction

The judgment of the Court of Appeals was entered on March 17, 1978. The jurisdiction of this Court is invoked pursuant to 28 USC, §1254(1).

Question Presented

Whether a microscope distributor's use of resale price maintenance to enforce a policy of territorial restrictions upon a retailer is a per se violation of Section 1 of the Sherman Act, 15 U.S.C., §1.

Statute Involved

The statutory provision involved is Section 1 of The Sherman Anti-Trust Act, 15 USC §1, which is printed in Appendix B, infra, p. 17.

Statement

The Petitioner, Eastern Scientific Company (hereinafter Eastern) is a Rhode Island corporation in the business of selling scientific instruments and medical supplies. Eastern sold Wild Heerbrugg microscopes as a dealer for Wild Heerbrugg Instruments, Inc. (hereinafter Wild), from 1961 through February, 1973, when Wild terminated Eastern's dealership. The Wild Heerbrugg microscope is manufactured by Wild Heerbrugg, Ltd., a Swiss company, and is a highly sophisticated instrument normally sold to hospitals, universities or other research facilities.

In July of 1973, Eastern filed a complaint in the United States District Court for the District of Rhode Island alleging, inter alia, that Wild had violated Section 1 of the Sherman Act by wrongfully establishing resale prices for

its products distributed by the plaintiff. An amended complaint filed on November 30, 1976, further alleged that the Respondent had a policy of territorial restrictions on the sale of its microscopes by its dealers.

The Respondent counterclaimed for the value of merchandise retained by Eastern after its termination. Jurisdiction in the District Court was conferred by 28 USC, §1337 (Commerce and Anti-Trust Regulations) and 28 USC, §1332 (Diversity of Citizenship).

During the course of the 24-day jury trial, evidence was introduced which showed that Wild had a policy of requiring Eastern not to sell outside of its assigned territory of Rhode Island at less than the suggested list price published by Wild in its price lists. Under this policy, Eastern could sell at a discount from list price within its assigned territory of Rhode Island and could sell outside of its territory so long as all of its sales were at list price. However, when Eastern was in competition for a sale in the territory of another Wild dealer, it had to discount its price in order to overcome the customer's preference for buying from a local dealer. Therefore, when Eastern bid at list price, the sale always went to the local dealer if that dealer also solicited the sale.

This policy of the Respondent was not put in writing in the original dealer agreement between the parties. David Brodsky, President of Eastern, testified that he was first informed of the policy in approximately 1962 after a sale of Wild microscopes to Harvard University in Boston, Massachusetts, at discount. Walter Gumpertz, the sales manager of Wild at the time, informed him that he should not be seeking business at discount in the area that was assigned to the Eric K. Sobotka Company, another Wild dealer. Following this conversation, Eastern did not sell outside the State of Rhode Island at discount until late in 1967 when Eastern again attempted to expand and actively

bid on governmental contracts in the Washington, D.C., area and the university business in the southern United States. Following several bids at discount in this area, Eastern was requested to take back one of its bids and told that if it ever sold outside of the State of Rhode Island at discount again, Wild would terminate Eastern's dealership. To make amends, David Brodsky offered to pay his commission to the dealer that Wild felt should be handling the sale. Eastern lived up to its agreement with Wild not to sell at discount outside of its territory for several years. Eventually, Eastern began to make discount sales in Massachusetts and Connecticut. In early 1973, after a discounted sale to Harvard University in competition with a Wild dealer located in Boston, Eastern's dealership was terminated.

Throughout the trial, Wild denied that it ever had a policy of restricting territories in which its dealers could sell or in requiring sales to be made at list price. Walter Gumpertz specifically denied ever pressuring or threatening David Brodsky or any other employee or officer of Eastern to maintain its resale prices or restrict its sales to a certain area. Since the Respondent denied that these policies existed, it did not attempt to introduce any evidence showing that the restraints were reasonable or justified by some valid business purpose.

At the close of the evidence, the Petitioner requested that the jury be instructed that territorial restrictions and resale price maintenance were per se violations of the Sherman Act, basing its request on ***United States* v. *Arnold Schwinn & Company,*** 388 U.S. 365 (1966); and ***United States* v. *Bausch & Lomb Company,*** 321 U.S. 707 (1944), respectively. Although the Respondent objected to a portion of the court's charge, its objection was limited to the judge's use of a quotation from ***Northern Pacific Railroad* v. *United States,*** 356 U.S. 1, 5 (1958) to explain the meaning of a per se violation and not to the instruction that territorial restrictions and resale price maintenance were per se violations.

By a special verdict the jury found that Eastern agreed not to sell Wild microscopes at discount outside of the State of Rhode Island as a result of threats of termination by Wild of Eastern's dealership, and that Eastern did in fact sell Wild microscopes outside of Rhode Island at list price due to the respondent's coercion. The jury further found that Eastern suffered damages in the amount of $25,027.00. The jury found for the Respondent on its counterclaim for goods retained by the Petitioner at the time of termination in the amount of $2,969.88.[1]

After trebling the award, judgment was entered against the Respondent in the amount of $75,081.00 plus costs and attorneys' fees. On June 14, 1977, the Court denied the Respondent's Motion for Judgment Notwithstanding the Verdict or Alternatively for a New Trial and notice of appeal was filed on June 17, 1977.

On June 23, 1977, this Court issued its opinion in ***Continental TVX, Inc.* v. *G. T. E. Sylvania, Inc.,*** U.S. , 97 S.Ct. 2549 (1977). The Court in ***Continental TV*** overruled the ***Schwinn*** rule that territorial restrictions standing alone were per se illegal. On appeal to the First Circuit, the Respondent, characterizing the evidence as showing strictly a policy of territorial restriction, argued that the jury's verdict should be vacated and the case remanded to the District Court in light of the ***Continental TV*** decision. The Petitioner pointed out that the case involved a mixture of resale price maintenance and territorial restrictions and argued that the judgment should

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[1] The finding for the Respondent on its counterclaim was not appealed and is not before this Court.

be affirmed because resale price maintenance remained a per se violation of the Sherman Act.

The First Circuit agreed that resale price maintenance was involved in the case stating that, App., p. 13, "The practice Eastern complains of can best be described as a policy of territorial restriction enforced by price maintenance restraints." However, the Court did not apply the per se rule to these price maintenance restrictions. Rather, it determined that "The price restrictions at issue in this case are not the kind that require per se treatment." *Eastern Scientific Company* v. *Wild Heerbrugg Instruments*, (App., p. 15). The Court reached this conclusion after performing an economic analysis to determine whether the Respondent's combination of resale price maintenance and territorial restrictions had a greater anti-competitive effect than a policy restricting Petitioner's sales to Rhode Island would have had. Concluding that there was no greater anti-competitive effect, the First Circuit reversed the District Court's judgment and remanded the case for a new trial consistent with the standards set forth in *Continental TV, Inc.* v. *G. T. E. Sylvania, Inc., supra.*

Reasons for Granting the Writ

The Court of Appeals Erroneously Applied a Rule of Reason Analysis To a Distributor's Policy of Resale Price and Territorial Restrictions, In Direct Conflict With Decisions of This Court.

The fixing of prices at which a manufacturer's product is to be resold has long been a violation of the Sherman Act. *Dr. Miles Medical Co.* v. *John D. Park & Sons Company*, 220 U.S. 373 (1911). The Court on several occasions has announced that resale price maintenance is per se

illegal. See, e.g., *United States* v. *Bausch & Lomb Company*, 321 U.S. 707, 724 (1944); *United States* v. *Parke, Davis & Company*, 362 U.S. 29 (1960); *Alberchl* v. *The Herald Company*, 390 U.S. 145, 151 (1968). This Court was careful to note in *Continental TV, Inc.* v. *G. T. E. Sylvania, Inc.*, 97 S. Ct. 2549, 2558-59, n.18, that since neither *Schwinn* nor *Continental TV* involved allegations of price restraints on appeal, its decision did not affect the validity of the rule that vertical price restraints were a per se violation of the Sherman Act. The Court explained that the issue of the per se illegality of price restrictions involved significantly different questions of analysis and policy. Quoting Mr. Justice Brennan in his concurring opinion in *White Motor Company* v. *United States*, 372 U.S. 253, 268 (1962) the Court noted that "[r]esale price maintenance is not designed to, but almost invariably does in fact, reduce price competition not only *among* sellers of the affected products, but quite as much *between* that product and competing brands." 97 S.Ct. 2558-59, n.18.

It was well-established before the decision in *Schwinn* that vertical restraints as to territory or customers are per se violations if ancillary to price-fixing, *White Motor Company* v. *United States, supra*, p. 260, or if the price-fixing was an integral part of the entire distribution system, *United States* v. *Bausch & Lomb Company, supra.* Where the evidence shows a policy which constitutes a per se violation, evidence of the reasonableness of the practice or an investigation into the effect of the practice on the market is inadmissible. *United States* v. *Socony-Vacuum Oil*, 310 U.S. 150 (1940); *Northern Pacific Railroad* v. *United States*, 356 U.S. 1, 5 (1958).

Wild's price-fixing practices were an integral part of its entire distribution system. In fact, as the Respondent stated in its brief before the First Circuit at P. 16,

The price-fixing claim is inextricably intertwined with the claim of territorial restriction as the plaintiff alleged that by imposing price maintenance the defendant attempted to enforce a territorial restriction. The thrust of the testimony of plaintiff's principals was that they were not permitted to sell below the manufacturer's suggested list price outside of the State of Rhode Island.

Despite acknowledging that the evidence revealed price restraints, the First Circuit decided that it would not apply the per se rule of illegality because the price restrictions in this case were not the kind that required per se treatment. The Court explained its conclusion as follows at App. A, p. 16:

> . . . if the price at which Heerbrugg instruments would be competitive outside of Rhode Island is less than list price, requiring Eastern to sell at list does no more nor less than prohibit Eastern from selling outside of Rhode Island altogether. In the unlikely event that Heerbrugg instruments are competitive at list prices or higher than list prices, requiring Eastern to sell at list will have less of an anti-competitive effect than restricting its sale to Rhode Island regardless of price. Thus the resale price restriction in the present case produces the same anti-competitive effect as pure territorial restrictions but to a lesser degree.[2]

[2] Actually, the combination of territorial and price restrictions as devised by Wild does more than a flat territorial restriction would. Eastern could sell outside of its territory so long as the sales were at list. However, where there was competition from the local dealer, the requirement that the sale price be at list guaranteed the local dealer the sale. Thus Wild obtained the benefit of an aggressive marketer such as Eastern who desired to sell outside of its own territory while at the same time protected itself and its dealers from any competition among the dealers by insisting that all sales outside of a dealer's territory be made at list price.

In other words, the First Circuit has adopted a rule that there are different types of vertical price restrictions, some of which are to be judged under a per se rule while others are to be judged under the rule of reason. Apparently, the trial judge is to make a preliminary fact determination as to the anti-competitive effects of the particular price restriction in question before deciding if the jury is to receive a per se or rule of reason charge.

Such an approach is in direct conflict with this Court's decisions in ***United States* v. *Bausch & Lomb Company, supra, White Motor Company* v. *United States, supra,*** and ***United States* v. *Parke, Davis & Company, supra.*** It finds no support in the Court's decision in ***Continental TV*** since that opinion clearly relates only to vertical territorial restraints. The one anti-competitive effect that most likely would result from the distribution system of Wild, that the prices for Wild microscopes sold in Massachusetts, Connecticut and other territories outside of Eastern's territory of Rhode Island would remain fixed at list price, was not considered by the First Circuit. Yet, it was this consequence of a distribution sytem that the Court held was per se illegal in ***United States* v. *Bausch & Lomb Company, supra.***

Several other courts since ***Continental TV*** have considered the rule that resale price maintenance is per se illegal, and none have concluded that the rule is invalid or inapplicable. ***Pitchford Scientific Instruments Corporation* v. *Pepi, Inc.*,** 1977-2 Trade Cases, ¶61,741 (WDPA 1977) dealt with a situation similar to the one at bar. The opinion is printed in Appendix C. Pitchford Scientific Instruments Corporation, seller of scientiic instruments of the defendant, Pepi, Inc., had recovered a judgment in the Western District of Pennsylvania for resale price maintenance and territorial restriction violations of the Sherman Anti-Trust Act, among other claims. When this Court's decision in ***Continental TV*** was announced, the case was on

remand on the issue of damages following appeal to the Third Circuit. *Pitchford Scientific Instruments Corporation* v. *Pepi, Inc.,* 531 F.2d 92, *cert. denied,* 426 U.S. 935. The Third Circuit ruled that the defendant's petition to recall the mandate in light of *Continental TV* should be heard first by the trial judge. The trial judge denied the defendant's request for a new trial on the grounds that the case involved price-fixing in addition to territorial restrictions and *Continental TV* did not change the rule that these price restraints were per se illegal.

The case of *General Beverage Sales Company* v. *East Side Winery,* F.2d (7th Cir. Jan. 9, 1978) 1978-1 Trade Cases, ¶61,815 is also instructive. This opinion is printed in Appendix D. In *General Beverage Sales Company* v. *East Side Winery,* the plaintiff recovered a judgment against the defendant alleging that it was terminated because it violated the defendant's territorial restrictions, among other things. On appeal, the plaintiff attempted to avoid the application of *Continental TV* to its case on the grounds that vertical territorial restrictions are per se illegal when they are part of a price-fixing scheme, citing *United States* v. *Bausch & Lomb Company,* 321 U.S. 707 (1944). The Seventh Circuit acknowledged the logic in the plaintiff's argument, but reversed on the ground that there was no evidence of a price-fixing scheme at trial.

There is nothing which points up more clearly the distinction between the case at bar and *Continental TV* than the contrasting analysis of the District Court evidence in the majority and dissenting opinions in *Oreck Corporation* v. *Whirlpool Corporation,* 563 F.2d 54 (2nd Cir. 1977). In the majority opinion, Judge Anderson nowhere eludes to the fact that the defendant's territorial restrictions were part of a scheme to maintain artificially high retail prices for vacuum cleaners. In Judge Mansfield's dissenting view the territory restriction was an

essential part of the resale price maintenance to benefit Sears. If there were no price implications involved, the majority decision clearly would be justified: if there were a price-fixing element to the case, the dissent would produce the correct result.

There can be no question that the jury found Wild had a policy of resale price maintenance. The First Circuit use of an economic analysis to differentiate among types of price restrictions to determine to which the per se rule of illegality will apply conflicts directly with this Court's prior decisions. The combination of vertically imposed price and territorial restrictions is not an isolated practice as evidenced by the fact that it has been presented in four different circuits since this Court's decision in June, 1977. The Petitioner respectfully submits that the Court below erroneously decided an issue of sufficient importance to require this Court's immediate review.

Conclusion

For each of the foregoing reasons, we respectfully submit that this Petition should be granted, that a Writ of Certiorari should be issued to review the opinion and judgment of the Court of Appeals, and that said opinion and judgment should be reversed.

Respectfully submitted,

The Petitioner
By Its Attorneys,
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APPENDIX A

United States Court of Appeals

For the First Circuit

No. 77-1286

EASTERN SCIENTIFIC COMPANY,
PLAINTIFF, APPELLEE,
v.
WILD HEERBRUGG INSTRUMENTS, INC.,
DEFENDANT, APPELLANT.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND
[HON. RAYMOND J. PETTINE, *U.S. District Judge*]

Before COFFIN, *Chief Judge,*
CAMPBELL AND BOWNES, *Circuit Judges.*

Robert P. Lynn, Jr., with whom *Lynn, Perlman & Ledwith, Deming E. Sherman*, and *Edwards & Angell* were on brief, for appellant.
Dennis J. Roberts II, with whom *Berndt W. Anderson* and *Roberts & Willey Incorporated* were on brief, for appellee.

March 17, 1978

COFFIN, *Chief Judge.* Plaintiff, Eastern Scientific Co. [hereinafter Eastern], is in the business of selling scientific instruments. During the period from 1961 through 1972 it marketed the products of the defendant, Wild Heerbrugg Instruments, Inc. [hereinafter Wild], an importer and distributor of scientific equipment manufactured by Wild Heerbrugg, Ltd., a Swiss company. Wild terminated Eastern as a dealer of its products in February, 1973.

Eastern, claiming that Wild had violated the anti-trust laws, brought suit under §1 of the Sherman Act, 15 U.S.C. §1.

According to Eastern, Wild demanded that it not sell any of Wild's products outside its assigned area of Rhode Island at less than list price. Wild imposed no restrictions on Eastern's sale activities within Rhode Island. Eastern submitted evidence that it complied with Wild's policy out of fear that if it did not do so it would lose its dealership. The two companies disagreed on several occasions as to whether Eastern should sell below list outside of Rhode Island and Eastern argues that this eventually led to its termination. The practice Eastern complains of can best be described as a policy of territorial restriction enforced by price maintenance restraints. The district court instructed the jury that conduct of this nature amounted to a per se violation of the Sherman Act. The jury found in favor of plaintiff and Wild appeals.

Wild's first argument on appeal is that since the time of the district court's decision the law in this area has changed to the extent that a new trial is required. Because we agree with this position, we see no need to address ourselves to any of the other issues raised in this appeal.

A few days after the conclusion of the district court proceedings the Supreme Court issued its opinion in *Continental TV, Inc.* v. *GTE Sylvania, Inc.*, 45 U.S.L.W. 4828 (June 23, 1977). Prior to that decision, the law relating to territorial restrictions was governed by the holding of *United States* v. *Arnold, Schwinn and Co.*, 388 U.S. 365, 379 (1966); ". . . where a manufacturer sells products to his distributor subject to territorial restrictions upon resale, a per se violation of the Sherman Act results. . . . [t]he same principle applies to restrictions of outlets with which the distributors may deal and to restraints upon retailers to whom the goods are sold. Under the Sherman Act it is unreasonable without more for a manufacturer

to seek to restrict and confine areas or persons with whom an article may be traded after the manufacturer has parted with dominion over it." *GTE Sylvania* overruled this per se rule and instructed courts to apply a rule of reason standard in evaluating territorial restrictions.

A per se violation can be found simply by determining that alleged practices existed "without elaborate inquiry as to the precise harm [the suspect practices] . . . caused or the business excuse for their use." *Northern Pac. R. Co.* v. *United States,* 356 U.S. 1, 5 (1958). In contrast, the rule of reason requires the court to analyze "whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained—all are relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of the intent may help the court to interpret facts and to predict consequences." *Chicago Board of Trade* v. *United States,* 246 U.S. 231, 238 (1918). Determining that a practice exists is only the very first step in deciding a case under the rule of reason. Since the trial below and the district court's instructions to the jury were premised on defendant's conduct amounting to a per se violation of the law, the district court's judgment must be reversed and the case remanded for further proceedings consistent with the correct legal standard. *See Adolph Coors Co.* v. *A and S Wholesalers, Inc.,* 561 F.2d 807 (10th Cir. 1977); *General Beverage Sales Co.* v. *East Side Winery,* slip op. (7th Cir. 1978).

It is clear, and appellee does not dispute the fact, that an appellate court "must apply the law in effect at the time it renders its decision", *Thorpe* v. *Housing Authority,* 393 U.S. 268, 281 (1968); *Vandenberg* v. *Owens Illinois Co.,* 311 U.S. 538 (1940); *Robinson* v. *Heilman,* slip op. (9th Cir. Oct. 31, 1977); *Lytle* v. *Commissioners of Elections of Union County,* 541 F.2d 421 (4th Cir. 1976), unless doing so would cause manifest injustice, *Bradley* v. *Richmond School Bd.,* 416 U.S. 696, 716 (1973). Eastern does argue, however, that *GTE Sylvania* is entirely consistent with the trial court's instructions, verdict, and judgment and consequently a remand is unnecessary. Eastern relies in particular on footnote 18 of the *GTE Sylvania* opinion, 45 U.S.L.W. at 4832, in which the Court emphasizes that its conclusions relate only to nonprice restrictions and are not intended to affect the "per se illegality" of resale price restrictions. Thus Eastern maintains that while a pure territorial restriction can no longer be evaluated under the per se rule of *Schwinn,* a policy of territorial restriction that includes resale price restrictions is still per se illegal. We disagree. The price restrictions at issue in this case are not the kind that require per se treatment.

The entire thrust of the *GTE Sylvania* opinion is that "departure[s] from the rule of reason standard must be based upon demonstrable economic effect rather than . . . formalistic line drawing", *id.* at 4834, and that " 'The Anti-Trust Act aims at substance.' ", *id.,* at 4831 (quoting from *Appalachian Coals, Inc.* v. *United States,* 288 U.S. at 344, 377 (1933)). It may be true that defendant's policies here appear in *form* to resemble resale price maintenance agreements. However, we are unable to conceive of how the resale price restrictions used to enforce the assigned territories in the present case can possibly have a greater

anti-competitive *effect* than a pure policy of territorial restrictions.* Certainly, if the price at which Heerbrugg instruments would be competitive outside of Rhode Island is less than list price, requiring Eastern to sell at list does no more nor less than prohibit Eastern from selling outside of Rhode Island altogether. In the unlikely event that Heerbrugg instruments are competitive at list prices or at higher than list prices, requiring Eastern to sell at list will have less of an anti-competitive effect than restricting its sale to Rhode Island regardless of price. Thus the resale price restriction in the present case produces the same anti-competitive effect as pure territorial restrictions but to a lesser degree. If the Supreme Court holds that pure territorial restrictions should be analyzed under the rule of reason, we can see no reason based on substantive economic effect why a similar but less anti-competitive scheme should be treated differently.

We reverse the district court's judgment and remand for a new trial consistent with the standards explained in Continental TV, Inc. v. *GTE Sylvania, Inc., 45 U.S.L.W. 4283 (June 23, 1977) and this opinion.*

* That the resale price restrictions allegedly imposed by Wild were limited to the enforcement of territorial restrictions is clear from the testimony of David Brodsky, Vice President of Eastern, during direct examination at trial.

APPENDIX B

§ 1. Trusts, etc., in restraint of trade illegal; penalty*

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1 to 7 of this title to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

* The statute presently in effect reflects two amendments made after the events giving rise to this cause of action occurred. The deletion of the fair trade exemption, Pub. L. 94-145, §2, 89 Stat. 801, and the increasing of the criminal penalty, Pub. L. 93-528, §3, 88 Stat. 1708, do not affect the issues raised by this case.

APPENDIX C

[¶61,741] Pitchford Scientific Instruments Corp. v. Pepi, Inc., North American Philips Corp., and Philips Electronic Instruments, Inc.

U.S. District Court, Western District of Pennsylvania. Civil Action No. 70-1461. Filed July 13, 1977.

For plaintiff: Buchanan, Ingersoll, Rodewell, Kyle & Buerger, Pittsburgh, Pa. *For defendants:* Kaufman & Kaufman, Pittsburgh, Pa.

Opinion

DUMBAULD, D.J.: Following a lump sum verdict of $825,-000 for plaintiff in an antitrust triple damage suit under 15 U.S.C. 1 and 15, the Court of Appeals concluded that damage to plaintiff arising from price-fixing, exclusive dealing, and full-line forcing had not been sufficiently proved, and remanded for further proceedings to determine the "amount of damage in connection with the territoriality count." *Pitchford* v. *Pepi* [1975-2 TRADE CASES ¶ 60,653, 1976-1 TRADE CASES ¶ 60,744], 531 F.2d 92, 111 (C.A. 3, 1976). See also *ibid.*, 101-105. The facts of the case are sufficiently stated in the thorough opinion of the Court of Appeals, and need not be repeated here, as we are now concerned only with a question of law: namely, whether the opinion and mandate of the Court of Appeals are consistent with, or conflict with, the subsequent decision of the Supreme Court in *Continental T.V., Inc.* v. *GTE Sylvania, Inc.* [1977-1 TRADE CASES ¶ 61,488], 45 Law Week 4828, decided June 23, 1977.[1]

[1] This decision affirmed *GTE Sylvania Inc.* v. *Continental T.V., Inc.* [1976-1 TRADE CASES ¶ 60,848], 537 F.2d 980 (C.A. 9, 1976), in which the Ninth Circuit Court of Appeals utilized the unusual opportunity to reverse a retired Supreme Court Justice, the late Tom C. Clark, sitting by designation as the trial judge in the Northern District of California. *Ibid.*, 987.

Five days later, upon defendant's petition to recall the mandate and stay the retrial as to damages, the Court of Appeals denied the relief sought, holding that the District Court should make the initial determination with respect to the issue of inconsistency. The Court of Appeals said:

> If in fact the mandate of this Court is in conflict with a subsequent decision of the Supreme Court, the rule announced by the Supreme Court, rather than the mandate of this Court, will be the appropriate rule and should be followed by the district court. The controlling effect of the mandate from a higher to a lower court is an application of the law of the case doctrine, and that doctrine yields to the authority of a source of law higher than that of the court which issued the mandate. See *Banco Nacional de Cuba* v. *Sabbatino*, 383 F.2d 166 (2d Cir. 1967); cert. denied, 390 U.S. 956 (1968).

Stated generally, the *Continental T.V.* case overruled *U. S.* v. *Arnold, Schwinn & Co.* [1967 TRADE CASES ¶ 72-126], 388 U.S. 365 (1967), and reverted to the standards of *White Motor Co.* v. *U. S.* [1963 TRADE CASES ¶ 70,679], 372 U.S. 253 (1964), where "the Court had refused to endorse a *per se* rule for vertical restrictions." [45 L.W. 4831]. The Court abandoned reliance upon the "witty diversities of the law of sales"[2] with respect to transfer of title as the criterion of whether to apply a *per se* rule, in favor of "demonstrable economic effect," with the result that both sale and non-sale transactions are to be judged under the "rule of reason" in case of non-price vertical restrictions.[3]

[2] Justice Holmes in *Rearick* v. *Pennsylvania*, 203 U.S. 507, 512 (1906), said that " 'Commerce among the several States' is a practical conception, not drawn from the 'witty diversities' (Yelv., 33) of the law of sales."

[3] The classical explanation of the reasons for establishing a *per se* rule as an exception to the rule of reason is given by the late Mr. Justice Black in *Northern Pacific Co.* v. *U. S.*, [1958 TRADE

[*Effect on Price Fixing Cases*]

One dangerous consequence of the decision is the possible impetus given to potential erosion of the *per se* ban on price-fixing. As Judge Browning pointed out in his cogent dissenting opinion: "Indeed, 'any argument that can be made on behalf of exclusive territories can also be made on behalf of resale price maintenance.' " 537 F.2d at 1019. And Mr. Justice White observes in his concurring opinion that "the economic arguments in favor of allowing vertical non-price restraints generally apply to vertical price restraints as well." 45 L.W. at 4836 and note 10, as well as note 18 of the majority opinion at 45 L.W. 4832.

[*Vertical and Horizontal Restrictions*]

Vertical restrictions may be understood as those imposed by agreement between a manufacturer and a distributor or dealer, where the parties occupy a different rank in the hierarchy of distribution. Horizontal restrictions may be

CASES ¶ 68,961], 356 U.S. 1, 5 (1958): "However, there are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use. This principle of *per se* unreasonableness not only makes the type of restraints which are proscribed by the Sherman Act, more certain to the benefit of everyone concerned, but it also avoids the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable—an inquiry so often wholly fruitless when undertaken. Among the practices which the courts have heretofore deemed to be unlawful in and of themselves are price fixing, *United States* v. *Socony-Vacuum Oil Co.* [1940-43 TRADE CASES ¶ 56,021], 310 U.S. 150, 210; division of markets, *United States* v. *Addyston Pipe & Steel Co.*, 85 F. 271, aff'd, 175 U.S. 211; group boycotts, *Fashion Originators' Guild* v. *Federal Trade Comm'n* [1940-1943 TRADE CASES ¶ 56,101], 312 U.S. 457; and tying arrangements, *International Salt Co.* v. *United States* [1946-1947 TRADE CASES ¶ 57,635], 332 U.S. 392."

understood as those imposed by agreement between parties of the same rank or level in the system of distribution.

A priori one would have supposed that this was a factitious and unprofitable distinction; that if a contract or agreement between two parties operated to restrain trade it would not matter what position either of them occupied in the distribution system. However, the distinction is recognized as very important and controlling by the Supreme Court in the *Continental T.V.* case. One would have supposed that the transfer of title affords a simple and workable rule, based on the fundamental distinction between *meum* and *tuum*. One's power to do what he will with his own (see Mt. 20:15) would seem quite different from his power to do what he will with the property of someone else.

[*Neglected Precedent*]

Strangely, the Court does not cite at all two landmark cases, *Dr. Miles Medical Co.* v. *John D. Park & Sons Co.*, 200 U.S. 373 (1911), and *U.S.* v. *General Electric Co.*, 272 U.S. 476 (1926), which are mentioned only in Mr. Justice White's concurring opinion. And *Addyston Pipe*,[4] the *fons et origo* of the law on price-fixing, division of customers, and allocation of territory, is entirely overlooked in all the opinions.

Hence it is probable that the *Continental T.V.* case will produce as much confusion and controversy as the *Schwinn* case which it superseded.[5] A full discussion of the subject, frequently cited in the *Continental T.V.* case, is contained in the American Bar Association Antitrust Section, Monograph No. 2, Vertical Restrictions Limiting Intrabrand Competition. It is likely that the long-continuing

[4] *Addyston Pipe and Steel Co.* v. *U. S.*, 175 U.S. 211 (1899).

[5] For the literature on *Schwinn* to which the Court adverted, see note 13 of its opinion.

controversy on this topic which as there said (p. 98) "goes to the very heart of antitrust policy," will not be forever laid to rest by the impact of the Supreme Court's latest pronouncement.

For present purposes, however, we must accept *Continental T.V. as the dernier cri* on the subject-matter involved, scrutinize carefully its scope, and see how it squares with the views of the Court of Appeals:

[*Absence of Inconsistency*]

Careful examination of the Supreme Court's *Continental T.V.* decision and the opinion of the Court of Appeals in the case at bar reveals no inconsistency or conflict which would warrant departure from the mandate of the latter court to proceed with trial on the issue of damages under the territoriality count. This conclusion is supported by a number of reasons:

1. The *T.V.* case deals only with vertical restrictions. The Supreme Court opinion speaks of such restrictions *passim*. In note 18, for example, it is said: "As in *Schwinn*, we are concerned here only with nonprice vertical restrictions." In the last paragraph of the opinion the Court says: "In sum, we conclude that the appropriate decision is to return to the rule of reason that governed vertical restrictions prior to *Schwinn*." In note 28 the Court says: "There is no doubt that [horizontal] restrictions . . . would be illegal *per se*," citing cases.

[*Horizontal Restraints*]

In the case at bar, however, the Court of Appeals found that the evidence established a *horizontal* restraint, which would be a violation *per se* without regard to the *Schwinn* rule. "In the present case . . . the record reveals an explicit agreement between PEI and each dealer to divide territories. Thus a horizontal restraint, a *per se* violation of the Sherman Act, could be found on this record, even if the *Schwinn* prohibition of vertical restraints were not dispositive." 531 F.2d at 104.

[*Location Clause Restraints*]

2. The *T.V.* case dealt only with a "location" clause, similar to that approved in *Kaiser* v. *General Motors Corp.* [1975-1 TRADE CASES ¶ 60,354], 396 F. Supp. 33, 39-41 (E.D. Pa. 1975), aff'd 530 F.2d 964 (C.A. 3, 1976[6]).

At the very beginning of Mr. Justice Powell's opinion, he speaks of franchise agreements "barring retailers from selling franchised products from locations other than those specified in the agreements," and goes on to say that the *Continental T.V.* case "presents important questions concerning . . . *these* restrictions." [Italics supplied].

It appears clearly from the Ninth Circuit opinion that the Sylvania restriction was a *vendor* restriction and not a *vendee* restriction; that "each Sylvania dealer was *free to sell to any buyer he chose*" from his authorized location. 537 F.2d at 990.

In violation of the purely locational restriction in that case, Continental did not merely seek to sell from its San Francisco location to customers located elsewhere, but opened a new (unauthorized) location in Sacramento to which it moved Sylvania merchandise. 537 F.2d at 984-85.

In the case at bar, however, the effect of the territorial restriction is to forbid sales to customers located outside the dealer's assigned territory. This is in fact a *vendee restriction* rather than a mere *location restriction*. Pitchford had its location in Pittsburgh, where the central office of U.S. Steel is located, and by reason of good relations with that corporation's headquarters personnel, sought to make, and doubtless could have made in the absence of defendant's restrictive practices, sales from the Pittsburgh location of Pitchford territory.

[6] Cited in note 11 of the *T.V.* opinion.

The economic impact of defendant's restrictions was thus more serious than that of the purely locational restrictions involved in the *T.V.* case.

[*Price Fixing*]

3. The *T.V.* case dealt with a location restriction standing alone, and unconnected with a price-fixing plan. The jury had expressly so found. The jury answered "No" to the question whether Sylvania had engaged in "location restrictions and price fixing as an integral part of a single distribution policy;" and "Yes" to the question whether Sylvania had violated the antitrust laws "with respect to locations restrictions alone." 537 F.2d at 985-86.

The Supreme Court emphasized that the jury found that Sylvania had violated the antitrust laws "with respect to location restrictions alone." In note 9 the Court commented: "Most important was the jury's rejection of the allegation that the location restriction was part of a larger scheme to fix prices."

As quoted above in connection with point 1, note 18 of the *T.V.* opinion emphasizes that "we are concerned here only with ***nonprice*** vertical restrictions." [Italics supplied].

In the case at bar, however, it is manifest that defendant's territorial restrictions were part and parcel of a comprehensive price-fixing policy. In the apt words of Judge Wisdom in *Copper Liquor, Inc.* v. *Adolph Coors Co.* [1975-1 Trade Cases ¶ 60,128], 506 F.2d 934, 948 (C.A. 5, 1975), the defendants' restraints "were ancillary to an illegal price fixing scheme." Even on a printed record, without being able to see defendant's vice-president in charge of sales attempt to foist the blame for distribution of price directions to dealers upon the mailing clerk, (Tr. 2620-24) the Court of Appeals squarely found that the evidence supported a finding of price-fixing. 531 F.2d at 98.

[*Lack of Injury*]

The fact that plaintiff failed to prove loss or damage attributable to the price-fixing violation[7] (*ibid.*, at 99) does not detract from the integration of price-fixing and territorial restrictions characterizing the defendant's sales practices of which both types of restraint formed part and parcel.

[*Rule of Reason Treatment*]

4. Finally, even if in the case at bar the Court had not mentioned *Schwinn* at all[8] or had tried the case under the *T.V.* rule of reason, the outcome would have been no different, and from the practical standpoint no harm has been suffered by defendant by reason of the trial court's failure to anticipate the overruling of *Schwinn* by the *T.V.* case. Any error (in the light of hindsight) committed is harmless.

This is true because in fact the trial court permitted defendant to offer all the testimony which they desired to present in order to show that the territorial restrictions which they included in their dealer contracts were in fact reasonable, and were justified by the nature of the product, its danger to the public if not properly operated, and the need for expert service.[9]

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[7] There was little evidence that Pitchford was a "price-cutter" and would have sold at a lower price if free to do so. The only instance of a price concession which comes to mind is that of a sale to a hospital in 1969 (see 531 F.2d at 98) where defendants finally absorbed much of the reduction in the guise of a donation to the hospital (which would now be described as "laundered money") and the inviolability in principle of the fixed list price was maintained.

[8] *Schwinn* was mentioned only peripherally and incidentally in the charge when discussing price-fixing. All that the Court said was: "Another refinement, which we don't need to go into here, is another recent Supreme Court case about bicycles. The name of that company was Arnold Schwinn." Tr. 3230.

[9] Defendants were doubtless seeking the benefit of a holding such as that in *Trioli Co.* v. *Wella Corp.* [1970 TRADE CASES ¶ 73,154], 425 F.2d 932, 936-39 (C.A. 3, 1970), or *U. S.* v. *Jerrold Electronics Corp.* [1960 TRADE CASES ¶ 69,784], 187 F. Supp. 545, 557 (E.D. Pa. 1960).

It would be difficult to imagine any significant new evidence which defendants could adduce under the rule of reason if a new trial were had. Doubtless the resourcefulness and ingenuity of counsel could come up with something, but it is extremely doubtful whether the additional evidence would be of sufficiently substantial character to warrant a new trial in a protracted antitrust case.

At the previous trial the jury specifically negated defendant's rule of reason defense by answering "No" to the interrogatory: "Were legitimate business reasons (such as poor performance) a predominantly contributing factor to termination of Pitchford Scientific Instruments Corporation's dealership on September 10, 1970?"

For the foregoing reasons the *T.V.* case does not appear to be applicable to the case at bar in such a manner as to conflict with the rulings of the Court of Appeals in the case at bar or to warrant suspension of the mandated trial with respect to the amount of damages under the territoriality count.

Accordingly, defendant's motions are denied, and the trial shall continue.

APPENDIX D

[¶61,815] General Beverage Sales Co. v. East-Side Winery.

U.S. Court of Appeals, Seventh Circuit. No. 77-1311. Decided January 9, 1978. Appeal from U.S. District Court, Eastern District of Wisconsin.

For plaintiff-appellee: William F. Nelson and Brian E. Butler, Madison, Wis. *For defendant-appellant:* Eugene O. Gehl, Madison, Wis., and Michael I. Miller, Chicago, Ill.

Before FAIRCHILD, Chief J., CUMMINGS, Cir. J., and COWEN, J.*

[Opinion]

CUMMINGS, Cir. J.; In April 1972, plaintiff, a wholesale distributor of distilled spirits, wines and brandies, sued defendant, its former supplier of wines and brandies for breaking off their relationship.

[*Distributorship Contract*]

Count I of the April 1973 amended complaint was based on diversity of citizenship and alleged that defendant had breached an October 1, 1970, agreement under which the plaintiff was appointed the exclusive wholesale distributor of defendant's wines and brandies in certain Wisconsin counties. One of the obligations imposed sales performance levels or quotas on plaintiff "conditioned upon the [defendant's] prompt shipment of goods based on orders submitted by the [plaintiff] distributor to the [defendant] company." Plaintiff alleged that during the months of

* Honorable Wilson Cowen, Senior Judge of the United States Court of Claims, is sitting by designation.

October, November and December 1971 defendant did not promptly ship goods to plaintiff as required by the agreement and yet terminated the agreement on January 25, 1972, for the reason that plaintiff had failed to meet its quotas. In Count I, plaintiff sought $2,500,000 in damages for breach of contract under Wisconsin law.[1]

[*Territories*]

Count II was brought under Section 1 of the Sherman Act (15 U.S.C. §1). Plaintiff alleged that defendant had violated that statute by limiting its wholesale distributor's sales of defendant's wines and brandies to prescribed geographical sales territories. Defendant assertedly terminated plaintiff on January 25, 1972, because plaintiff refused to confine its sales to its prescribed territories. Plaintiff claimed damages of $2,575,000 (before trebling) under Count II.

[*Price Discrimination*]

Count III of the amended complaint was brought to vindicate defendant's alleged violations of Sections 2(d) and 2(e) of the Robinson-Patman Act (15 U.S.C. §§ 13(d) and 13(e)). According to this Count, from August 1971 to January 1972 the defendant shipped goods more promptly to plaintiff's competitors than to plaintiff and granted them promotional allowances and services and facilities not available to plaintiff. For these violations of the Robinson-Patman Act plaintiff sought $2,500,000 (before trebling).

In its answer to Count I of the amended complaint, defendant denied that it breached the October 1, 1970, agreement with plaintiff, on the ground that said agreement provided for termination of plaintiff for its failure to meet quotas set by that agreement. As to Count II, defendant denied that it had imposed geographical sales territories on plaintiff and its competitors. As an affirmative defense to Count II, defendant charged that (1) plaintiff was *in pari delicto;* (2) plaintiff was estopped because it had realized and accepted the benefits of the restrictions; and (3) plaintiff's claim was barred by the four-year statute of limitations (15 U.S.C. §15(b)). With respect to Count III, defendant denied that it violated Sections 2(d) and 2(e) of the Robinson-Patman Act and reiterated the *in pari delicto,* estoppel and statute of limitations defenses asserted in Count II. Defendant also filed a counterclaim consisting of five causes of action.

In June 1975, the district judge denied [1975-2 TRADE CASES ¶ 60,409] plaintiff's motion to strike defendant's affirmative defenses and denied plaintiff's motion to dismiss defendant's second, third, fourth and fifth counterclaims.[2] On July 29, 1976, plaintiff sought to file a proposed second amended complaint[3] but leave was denied a month later because of "no need to amend." The jury trial commenced three weeks thereafter.

Although the district judge initially indicated that he would grant plaintiff's motion for a directed verdict on "that part of Count III which alleges * * * discriminatory promotional allowances" (Tr. 925) and that he would grant a motion for a directed verdict for the plaintiff on what appears to be only the issue of the territorial restrictions in Count II (Tr. 929-933), he eventually declined to grant those motions; we agree with that ultimate resolution. See

[1] Count I need not detain us, for the jury only found that defendant had violated the federal antitrust laws as charged in Counts II and III. It did not make a finding on Count I because it was instructed to ignore that Count if it found that defendant violated the antitrust laws.

[2] Plaintiff had filed an answer to defendant's first counterclaim.

[3] In Count III the proposed pleading added allegations of price discrimination in supposed violation of Section 2(a) of the Robinson-Patman Act (15 U.S.C. § 13(a)).

Part III *infra*. After a 9-day trial, the cause was submitted to the jury which returned the following verdict on the same day:

VERDICT

Antitrust Questions

1. Did the defendant East Side Winery violate the antitrust laws of the United States?[4]

Answer: Yes.

If your answer to question No. 1 is "No," then do not answer the following question numbered 2:

2. Was the violation of the antitrust laws as found by you in question No. 1 a substantial and proximate cause of injury to the plaintiff's business or property?

Answer: Yes.

If your answer to question No. 2 is "No," then do not answer the following question numbered 3:

3. What sum of money would fairly and reasonably compensate the plaintiff for the damages it sustained by reason of the violation of the antitrust laws?

Answer: $500,000.

Breach of Contract Questions

(Do not answer questions number 4, 5, and 6 if you have answered questions numbered 1 and 2 "Yes" and have filled in an amount for question No. 3.)

4. Independent of and outside of the antitrust laws, did the defendant East Side Winery breach, under the laws of the State of Wisconsin, the distributorship agreement between the parties dated October 1, 1970?

Answer: ________________

If your answer to No. 4 was "Yes," then answer the following question numbered 5:

[4] In its instructions the court defined "antitrust laws" as including the Robinson-Patman Act.

5. Was the breach of the distributorship agreement between the parties a substantial and proximate cause of injury to the plaintiff's business or property?

Answer: ________________

If your answer to question No. 5 was "Yes," then answer the following question numbered 6:

6. What amount of money would fairly and reasonably compensate the plaintiff for the damages it sustained by reason of the defendant's breach of the distributorship agreement?

Answer: $________________

7. Is the defendant entitled to receive from the plaintiff the sum of $156,062.48[5] for goods sold and delivered by the plaintiff in or around January 5, 1972?

Answer: Yes.

(Answered "Yes" by agreement of the parties.)

Dated at Milwaukee, Wisconsin, this 7th day of October, 1976.

Jacqueline Bengala
Foreperson

Thereafter, judgment was entered for plaintiff in the sum of $1,307,401.75, plus 7% interest, costs of suit and reasonable attorneys' fees. This judgment consisted of the $500,000 jury verdict for plaintiff, trebled pursuant to 15 U.S.C. § 15 to $1,500,000. This amount was reduced by $156,062.48 pursuant to the jury verdict for defendant on its first counterclaim, plus interest, for a total of $192,598.25. Subsequently, the district judge awarded plaintiff costs of $3,394.50 and attorneys' fees of $127,564.98 [1977-1 Trade Cases ¶ 61,283]. We reverse and remand for a new trial.

[5] $156,062.47 was the amount sought (excluding interest) in defendant's first counterclaim.

I. *The Instructions on Territorial Restrictions* [*Use of New Rule on Appeal*]

About eight months after the conclusion of the jury trial, the Supreme Court handed down *Continental T.V., Inc.* v. *GTE Sylvania, Inc.* [1977-1 TRADE CASES ¶ 61,488], 45 U.S. LW 4828, holding that territorial restrictions are not illegal *per se* under the Sherman Act, thus overruling *United States* v. *Arnold Schwinn & Company* [1967 TRADE CASES ¶ 72,126], 388 U.S. 365. We are of course required to decide this case on the basis of existing law rather than according to the law that existed at the time of the decision below. *United States* v. *Schooner Peggy*, 5 U.S. (1 Cranch.) 103, 109; *Bradley* v. *Richmond School Board*, 416 U.S. 686; *Hamling* v. *United States*, 418 U.S. 87, 102.

In the court below, the case was tried and the jury was instructed based on the law in *Schwinn*. Count II of the amended complaint asserted that defendant's territorial restrictions violated Section 1 of the Sherman Act, and during the trial plaintiff introduced substantial evidence to prove that defendant attempted to impose territorial restrictions and that the distributorship termination resulted from plaintiff's refusal to accede to such. During the course of the litigation, plaintiff's theory was that these territorial restrictions were unlawful *per se* under *Schwinn*.

One of the district judge's instructions to the jury was a *Schwinn-type* instruction that "territorial limitations * * * are per se violations of the antitrust laws." Subsequently he charged the jurors in accord with *Schwinn* as follows:

> In this regard, it is unlawful for a producer to terminate one of its distributors for the reason that the distributor objected to or departed from a plan by the producer to allocate or to restrict the territories in which its products could be sold.

Immediately thereafter, the district judge correctly told the jury that it is unlawful for a producer to terminate a distributor because of its objections to or departures from the producer's plan to fix or maintain retail prices and incorrectly told the jury that it would also be unlawful for a producer to terminate a distributor for distributing the products of a competing producer.[6] Then came the following instruction:

> Termination for any one *or* more of these [three] reasons is unlawful. (Emphasis supplied.)

Thus it is seen that the jury may have found defendant guilty of violating the Sherman Act because of territorial restrictions alone, now [im]permissible under the *Continental T.V.* case unless they violate the long-time rule of reason. To avoid a retrial, plaintiff argues first that defendant cannot challenge the *Schwinn* instructions because no objection was made to them at trial and, second, that even if a proper objection had been made the instructions should be upheld because *Continental T.V.* is distinguishable from the facts of this case.

[*Absence of Trial Objection*]

The argument that in order to receive the benefit of a change in the law on appeal a party must have objected to the old law at trial would give effect to the Supreme Court's now firm principle that an appellate court should apply the law in existence at the time of appeal only in those rare cases in which counsel had the foresight to predict the change. Cf. *Carpenter* v. *Wabash Ry. Co.*, 309 U.S. 23, 29. Not only would plaintiff's argument thus undermine the

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[6] Probably because of *Tampa Electric Co.* v. *Nashville Coal Co.* [1961 TRADE CASES ¶ 69,940] 365 U.S. 320, plaintiff concedes that this instrucion was overly broad (Br. 49), but since defendant gave no ground for its objection to this instruction as required by Rule 51 of the Federal Rules of Civil Procedure, we will not consider this as reversibie error. However, it should be cured on remand.

clear intention of the Supreme Court but it would also exceed the purposes of requiring an objection at trial: objections are required so that the trial judge can correct any errors, but given the applicable law at the time he gave the instruction the district judge here committed no error and in fact would have been wrong to instruct that *Schwinn* was not the law.[7] Even if, as plaintiff suggests, the appropriate standard is whether defendant's counsel can be faulted for failing to predict the change in the laws, we decline to find fault on the facts of this case because of the infrequency with which recent Supreme Court decisions are overruled even when, as here, they have been criticized by some commentators and courts.

[*Price Fixing*]

Plaintiff's more substantial contention is its attempt to distinguish *Continental T.V.* on two grounds. First, citing *Pitchford Scientific Instruments Corp.* v. *Pepi, Inc.*, 1977-2 TRADE CASES ¶ 61,741 (W.D. Pa. 1977), plaintiff argues that *Continental T.V.* is not controlling because it did not change the rule that vertical territorial restrictions are *per se* illegal when they are part of a price-fixing scheme. See *United States* v. *Bausch & Lomb Optical Co.* [1944-1945 TRADE CASES ¶ 57,224], 321 U.S. 707. Although this argument may be a fair reading of *Continental T.V.*, it is inapplicable here. Unlike *Pitchford*, in which the Third Circuit already had found that the evidence in the case supported a finding of price fixing[8] and the district judge found the defendant's territorial restrictions "were part

[7] Although *GTE Sylvania* v. *Continental T.V., Inc.* [1976-1 TRADE CASES ¶ 60,848], 537 F.2d 980 (9th Cir. 1976; *en banc*), was decided (with four dissenting judges) six months before this trial, *Schwinn* was still the law in the Seventh Circuit and in all the other federal circuits.

[8] *Pitchford* v. *Pepi* [1975-2 TRADE CASES ¶ 60,653, 1976-1 TRADE CASES ¶ 60,744], 531 F.2d 92, 98 (3d Cir. 1976).

and parcel of a comprehensive price fixing policy," 1977-2 TRADE CASES at 73-039, this case was not tried on a theory that the restraints "were ancillary to an illegal price fixing scheme" (*Copper Liquor, Inc.* v. *Adolph Coors Co.*, [1975-1 TRADE CASES ¶ 60,128], 506 F.2d 934, 948 (5th Cir. 1975)) and the record is insufficient to support our making such a finding. See Part III, *infra*.

[*Location v. Territory*]

Also based on *Pitchford*, plaintiff's second argument is that *Continental T.V.* is not controlling because it deals only with a " ' location' clause"—a restriction barring a vendor from selling products from locations other than those specified in the agreements—and not with an arguably more anti-competitive restriction (such as here) barring the vendor from selling to buyers in certain locations. Judge Dumbauld offered this distinction in *Pitchford* because Justice Powell, the author of the *Continental T.V.* opinion, spoke at the beginning only of the location clause and then went on "to say that the *Continental T.V.* case 'presents important questions concerning . . . *these* restrictions' [Italics supplied]." 1977-2 TRADE CASES at 73,038, quoting *Continental T.V.* v. *GTE Sylvania, Inc., supra*, at 4828. However, Justice Powell's own express limitation of the Court's holding later in the opinion was not so narrow but rather stated that "we are concerned here olny with nonprice vertical restrictions," *Id.* at 4832 n. 18, and the prohibition in *Schwinn* that was overruled by *Continental T.V.* was described as "attempting to restrict a 'retailer's freedom as to where *and to whom* it will resell the products' " (emphasis added). *Id.* at 4830. Still later in the opinion, Justice Powell expressly rejected the distinction that plaintiff asks us to draw: "The fact that one restriction was addressed to territory and the other to customers is irrelevant to functional antitrust analysis * * *" *Ibid;*

see also *Id.* at 4833 n. 29. That *Continental T.V.* intended to change the law relating to more than merely location clauses[9] is also clear from the conclusion of the opinion:

> [W]e conclude that the *per se* rule stated in *Schwinn* must be overruled. In so holding we do not foreclose the possibility that particular applications of vertical restrictions might justify *per se* prohibition under *Northern Pac. R. Co.* But we do make clear that departure from the rule of reason standard must be based upon demonstrable economic effect rather than —as in *Schwinn*—upon formalistic line drawing. *Id.* at 4834.

Applying this standard, on the record presented below *Continental T.V.* mandates that the rule of reason initially apply to the vertical restriction at issue here. The trial court's instruction therefore was erroneous and constitutes reversible (though unavoidable) error because a territorial restriction was one of the three grounds listed in the instructions as permitting a verdict for plaintiff under Counts II and III. Because this defect in the instructions affects the substantial rights of the defendant, it cannot be considered harmless error under Rule 61 of the Federal Rules of Civil Procedure. On remand, however, plaintiff should be afforded the opportunity to prove that this particular type of vertical restriction justifies *per se* prohibition "based upon demonstrable economic effect." *Id.* at 4834.

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[9] Justice White's concurring opinion as well as the opinion of the Ninth Circuit in note 7 *supra* both indicate that this reading of Justice Powell's majority opinion is correct. The concurrence attacks the majority opinion for failing to distinguish *Continental T.V.* from *Schwinn* as the Ninth Circuit did on the ground that the location clause in *Continental T.V.* was less intrusive than the "system of vertical restraints" in *Schwinn*, 45 LW at 4834-4835 (White, J., concurring). The majority, however, found no "principled basis for distinguishing *Schwinn* * * *." *Id.* at 4830. Put simply, if the majority had intended that location clauses were to be viewed differently from other systems of vertical restraints, it could have distinguished *Schwinn* instead of overruling it.

II. *The Instruction on Termination*

Defendant also contends that the district judge's attempt to instruct the jury on the duplication of damages resulted in an instruction that improperly allowed the jury to find that the termination of plaintiff's contract occurred for anti-competitive purposes if defendant was guilty of any antitrust violation. Initially, during an in-chambers conference, in response to the district judge's concern that the jury might award plaintiff damages both for breach of contract and for termination in violation of the Sherman Act, plaintiff tendered to the court an instruction which is substantially identical to part of the instruction eventually given. As finally given, the instruction read:

> Now if you find that the defendant has violated the antitrust laws, if you do find that, then, in effect, you have found that the termination of the plaintiff's contract occurred for anticompetitive purposes.
>
> * * *
>
> To put it another way, if the antitrust laws are violated, then it is implied that that contract was breached for anticompetitive purposes.

Despite his participation at the conference in formulating the instruction, just before the jury retired defense counsel objected to this instruction for its failure to tell the jurors that "before you determine that the termination of the distributorship contract was in violation of the antitrust laws, you must find that the intended effect of such termination has created unreasonable restraint of trade" (Tr. 1193-1194; see also Tr. 1196).

In the opinion accompanying the order denying defendant's motion for a new trial, the trial court held that defendant had waived this objection by failing to raise it properly under Rule 49(a) of the Federal Rules of Civil Procedure. However, the waiver provision of Rule 49(a) is inapplicable here because it applies when, in submitting

the issues to the jury, the court "omits any issue of fact raised by the pleadings or by the evidence." Defendant's objection did not request the introduction of a new factual question of even the alteration of the verdict form but rather requested a clarifying instruction about the form and is therefore governed by Rule 51. Cf. *McDonnell* v. *Timmerman*, 269 F.2d 54, 58 (8th Cir. 1959). Indeed plaintiff recognizes that Rule 51 governs (Br. 45, 47) and does not attempt to justify the district judge's ruling under Rule 49(a) (cf. Br. 39, 48).

Under Rule 51 there is no argument that defendant's objection was not timely, but plaintiff does argue that the defendant is bound by the instruction because the defendant participated in the conference where it was formulated. This argument, however, was rejected by the Fifth Circuit in *Alabama Great Southern Railroad* v. *Johnson*, 140 F.2d 968, 972 (5th Cir. 1944), and the result reached in that case has been accepted by the principal commentators. See 9 Wright and Miller, *Federal Practice and Procedure* § 2558; 5A Moore's *Federal Practice* ¶ 51.05. Plaintiff further argues that when read in context the instruction could not be interpreted by the jury to require a finding of anti-competitive termination if they found defendant guilty of any antitrust violation. If the challenged instruction were in the middle of several contrary instructions this argument might have merit, but since this instruction came at the tail-end of the court's charge, it cannot be said that it was cured by prior correct instructions.

Even plaintiff does not argue that the instruction as given properly states the law. As defendant's counsel put it, the basis for the objection is that under such an instruction, "the jury could find under the evidence that a violation of the antitrust laws occurred without also finding that the contract was terminated for anti-competitive reasons" (Defendant's App. 53). The trial court conceded this in-

terpretation was possible in its decision denying defendant's motion for a new trial (Defendant's App. 22; Plaintiff's Br. 39). Although improper purpose need not be proven if the specific offense charged is *per se* illegal, when the specific offense is not illegal *per se* we have been presented with no authority for conclusively implying improper purpose only from the fact that possibly *per se* offenses are also charged. See *Cooper Liquor, Inc.* v. *Adolph Coors Co.*, *supra.* At the next trial, such an instruction must be omitted and the verdict form should be redrawn to avoid the problem.

III. *Miscellaneous Contentions of Parties*

Despite the fact that it never moved at trial for a directed verdict on all its claims, apparently recognizing the errors in the jury instructions discussed *supra,* plaintiff argues that the jury verdict is unnecessary to support the judgment because plaintiff was entitled to a directed verdict that the defendant violated the antitrust laws on each of the following issues: defendant's resale price restrictions, defendant's termination of plaintiff, and defendant's discriminatory price allowances.

Given the strict standards that must be met before a case can be taken away from the jury (see *Hohmann* v. *Packard Instrument Company, Inc.*, 471 F.2d 815, 819 (7th Cir. 1973)), a directed verdict on the resale price restrictions issue would have been improper if requested because plaintiff's case (apart from evidence that must be viewed as barred by an October 1, 1970, release, at least in the absence of a contrary finding below) is based not on defendant's insistence upon any specific prices but rather on inferences that a jury might draw from language in generalized pricing discussions and from certain possibly unrelated actions by the defendant such as the monitoring of advertisements and invoices. Such inferences cannot support a directed

Sherman Act verdict on a resale price maintenance theory.

Nor would a directed verdict have been proper if requested on the question whether the termination of plaintiff violated Section 1 of the Sherman Act. A jury reasonably could have found that the termination was in response to a declining sales record even though plaintiff remained defendant's largest single distributor, or in response to plaintiff's selling brands of competing suppliers. Because the purpose of the termination is unclear and because plaintiff's evidence of the effect of defendant's conduct on an individual distributor is not conclusive on the issue of anti-competitive effect (see *Brown Shoe Co.* v. *United States,* [1962 Trade Cases ¶ 70,366], 370 U.S. 294, 320), the termination issue was properly left to the jury. We also agree with the district judge's decision not to grant a directed verdict on the Robinson-Patman Act issues because certain defenses are available under Section 2(d) and 2(e) thereof and plaintiff would still have to show damages and causal connection.

Defendant asserts that the instructions did not discuss anti-competitive purpose, causal connection and conduct tainted by a contract and conspiracy, but our study of the court's charge indicates that it was replete as to each such subject. We imply no view on contentions of the parties not expressly discussed in this opinion.

Plaintiff did not cross-appeal as to the $192,598.25 judgment against it on defendant's first counterclaim, so that said judgment must stand. The judgment for plaintiff is reversed and remanded for new trial.